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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

VREJ SARIAN, Plaintiff and Appellant, v. MANGOE, LLC, Defendant and Respondent.	B173602 (Los Angeles County Super. Ct. No. PC029950)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara M. Scheper, Judge. Affirmed.

Law Offices of Lee Arter, Lee C. Arter, and Linda D. Fraser for Plaintiff and Appellant.

Rosenberg Mendlin & Rosen and Roger M. Rosen for Defendant and Respondent.

Appellant Vrej Sarian appeals from a summary judgment in favor of respondent Mangoe, LLC, in this trip and fall case. Appellant contends the trial court erred by refusing to grant him a continuance, and there is a triable issue of fact regarding constructive notice. We affirm.

FACTS

Appellant alleged he tripped and fell over a downed portion of a five-foot high chain-link fence enclosing a vacant lot owned by respondent in Santa Clarita, California. The incident purportedly occurred the evening of January 8, 2002. Appellant alleged a portion of the fence had been pulled or had fallen down, blocking a sidewalk owned by the City of Santa Clarita (City).

Appellant was an experienced jogger and had jogged for many years. It was his practice to jog two to five times a week, for 20-30 minutes. He had always jogged "from the same area." He had last gone jogging only the previous day. Appellant had driven past the site two or three days earlier and did not see any part of the chain-link fence on the sidewalk. He was jogging in the middle of the sidewalk, looking in front of himself as he jogged. He felt there was enough light to be safe for jogging. He did not recall being distracted by anything taking his attention away from jogging when he fell. He did not notice the fence on the sidewalk before tripping over it and did not know why he did not see it. He did not remember if he was wearing his glasses and testified he did not think he needed glasses for distance on that occasion.

At the time of the incident, appellant was jogging with his wife. She was a slower jogger so he veered off on side streets once or twice. Appellant did not remember if there were any vehicles parked on the street or if there was any traffic traveling in the direction he was running. He did not know if the street was busy at that time of day.

At the time appellant fell, he had pulled ahead of his wife. No one, including his wife, observed appellant fall.

After his fall, appellant sat on a bus bench while his wife went for their car. He did not know whether she walked home to get it. He did not remember if he had difficulty walking immediately after the fall. A gas station and a market were on the corner across the

street, but they did not discuss going there to get help. After his wife got the car, she drove appellant home. Although he had health insurance, appellant did not see any doctor the night of the incident. The next day, he did not go to work as he "wasn't in the mood" and felt "terribly sick" but did not go to the doctor. His wife, a nurse, did not take him to a doctor or the hospital on the day of the incident. About a week after the incident, appellant went to see an attorney.

Appellant did not know how long the fence was on the ground before he fell on it. He did not know if the owner of the property knew the fence was down before he had his fall. Although he thought the fence on the sidewalk was a hazard, he did not report the downed fence to the City or to a long-time family friend on the city council.

The vacant lot was previously used for a gas station, and respondent had the chain-link fence installed after the gas station was demolished and the underground storage tanks were removed. Respondent regularly inspected the property at least monthly. Respondent's manager had personally inspected the property during the first week of January, a few days before the alleged incident. He found nothing wrong with the fence. Respondent received no report from anyone in January 2002 complaining of a problem with the fence.

The City's public works construction inspector for the area regularly drove past the vacant lot at least five times a day throughout 2001 and 2002. During a typical workday he spent at least one and a half hours driving on the highway on which the vacant lot was located. It was his duty to inspect city streets and sidewalks for potential hazards and to report them promptly so they could be corrected. If the inspector had seen a chain-link fence fallen on the sidewalk, he would have stopped immediately, attempted to move the obstruction and then reported the condition to the appropriate City department for follow up. On January 8, 2002, he drove past the lot several times in the course of his job duties as well as on his way to and from work and to and from his home during the noon hour. He last drove past the lot on his way home from work about 4:40 p.m. on January 8, 2002, and he saw nothing wrong with the fence.

Santa Clarita Transit bus drivers are required to look for and report conditions that may be potentially hazardous to bus patrons, such as a fence fallen on a sidewalk. The bus

drivers who stopped several times at the location while on their routes neither saw nor reported any problem with the chain-link fence.

PROCEDURAL HISTORY

Appellant filed a complaint against the City and respondent on December 6, 2002, and an amended complaint on March 12, 2003. Appellant alleged the City and respondent had actual or constructive notice that a portion of the fence was blocking the sidewalk and failed to repair and remove it from the sidewalk prior to his fall on January 8, 2002.

The City answered the amended complaint on March 18, 2003, and it filed a motion for summary judgment on October 23, 2003. The City argued summary judgment was appropriate because appellant could not establish the City had actual or constructive notice of the alleged dangerous condition and, if the incident occurred at all, the time was too short for the City to have reasonably discovered the condition.

The City's motion for summary judgment was never heard, because appellant dismissed the City with prejudice after the court granted the City's motion for an order compelling him to comply with discovery and for monetary sanctions.

Respondent answered the amended complaint on August 22, 2003.

By stipulation filed on September 5, 2003, the parties agreed the court could vacate the currently set trial date of January 5, 2004, subject to appellant's proviso that the new trial date be set for no later than February 27, 2004.

On October 24, 2003, respondent filed a motion for summary judgment on the grounds it was not the owner of the sidewalk, had no actual or constructive notice of the alleged hazard and had carried out a reasonable inspection policy of its adjacent property.

On December 24, 2003, appellant filed an opposition to respondent's motion for summary judgment and substantively opposed the motion. Within the body of the opposition, appellant also stated that the motion "should be continued as facts essential to opposing the Motion and justifying its denial *may exist* but have not yet been discovered. Additional time is needed to discover and obtain these facts." (Italics added.) In the concluding sentence of the opposition, appellant asked that the court deny the motion or, in the alternative, continue the hearing for 60 days.

At the hearing on January 8, 2004, the court granted respondent's motion for summary judgment. The court ruled it was undisputed that respondent had no actual notice of the fallen fence. The court also ruled respondent had no constructive notice as a matter of law, stating, "The defendant's inspection protocol, which the court finds to be reasonable, resulted in the inspection of the property during the first week of January 2002, just days before the alleged incident on January 8, 2002. At the time of defendant's inspection, the fence had not fallen. In the days following defendant's inspection, up to and including the day of the incident, numerous individuals, including the plaintiff, observed the area where the incident allegedly happened and did not observe a fallen fence. [N]o report of a fallen fence was made to defendant during the relevant time frame."

The court also denied appellant's request for continuance, stating: "Plaintiff has failed to set forth facts essential to oppose the instant motion that are to be obtained by the proposed discovery, and a reason why the discovery was not conducted earlier." Upon granting the summary judgment motion, the court ordered the trial date, set for February 17, 2004, to be vacated.

The court entered a judgment in respondent's favor on February 3, 2004. Appellant filed a motion for reconsideration, and the court denied the motion.

Appellant timely appealed from the judgment.[1]

CONTENTIONS

Appellant contends the trial court's denying a continuance and granting summary judgment was erroneous as a matter of law because it precluded him from garnering facts

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[1] Appellant purports to appeal from the order granting summary judgment under Code of Civil Procedure section 437c, subdivision (m)(1). An order granting summary judgment is not an appealable order. (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7.) However, we will construe appellant's appeal as taken from the judgment. (See § 437c, subd. (m)(1) ["a summary judgment entered under this section is an appealable judgment as in other cases"]; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 463, p. 511 ["A notice of appeal that specifies a nonappealable order or other interlocutory determination may be construed to refer to an existing appealable judgment or order that could and should have been specified" (italics omitted)]; see also *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 22 ["'[t]he law aspires to respect substance over formalism and nomenclature'"].)

essential to oppose the summary judgment motion. He further contends the issue of constructive notice of the downed fence is a factual issue for the jury.

DISCUSSION

We review orders granting or denying a summary judgment motion de novo. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60; *Tucker Land Co. v. State of California* (2001) 94 Cal.App.4th 1191, 1196.) We independently assess the correctness of the trial court's ruling, applying the same legal standard as the trial court. (*Ibid.*)

1. The Trial Court Properly Refused To Continue the Summary Judgment Motion

Code of Civil Procedure section 437c, subdivision (h) provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." Subdivision (h) mitigates the harshness of summary judgment where an opposing party has not had the opportunity to marshal evidence. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253 (*Cooksey*).)

A responding party seeking continuance of a motion for summary judgment must show, by affidavit or declaration: "'(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]'" (*Cooksey*, *supra*, 123 Cal.App.4th at p. 254.) Absent a proper declaration, a denial of a request for continuance is reviewed for abuse of discretion. (*Ibid*.)

In this case, appellant offered the declaration of his counsel to support his request for a continuance. Conspicuously absent from counsel's declaration was any showing of the "essential facts" appellant expected to obtain from proposed discovery and any reason to believe such facts existed. Also absent from the declaration was any showing that appellant had acted diligently in gathering facts to oppose the summary judgment motion. The declaration of counsel simply stated: "[Appellant] served [respondent's] counsel with Special Interrogatories and Demand for Production of Documents on September 23, 2003.

[Respondent's] counsel requested an extension of time, until November 3, 2003, during which to respond. Responsive documents bearing on [respondent's] ownership were served separate from verified responses on November 4, 2003 and on November 6, 2003. Responses were not received in my office until unverified responses were faxed over without proof of service on December 18, 2003. The same included objections already waived and that I find to lack in merit. Moreover, documents pertaining to the construction and repair of the fence that [respondent's manager] testified are likely to be in [respondent's] possession, custody and control, were never produced. Consequently, a hearing on [appellant's] Motion to Compel Further Discovery is on calendar for February 9, 2004. [¶] . . . In his deposition, [respondent's manager] identified to a limited extent, companies that retained others to construct the subject chain link fence and performed work on the premises of the vacant lot prior and subsequent to the construction of the fence, as well as individual(s) who repaired the fence when it collapsed. Specially Prepared Interrogatories are being propounded to ascertain the accurate, full names and addresses of said entities. A Notice of Taking the Deposition of Jose Luis, the individual who repaired the subject fence after it collapsed in early 2002 is set for January 9, 2004. [¶] . . . If discovered information appears to warrant the naming [of] additional defendants for defective construction of the fence, the same will need to be Doe'd-in prior to trial."

Counsel's declaration failed to include the "facts essential to justify opposition" that might exist. The declaration fails to specify *any* grounds for opposition. As an example, the declaration could have, but did not, aver that respondent had constructive notice because the fence was down for a long time before the incident, that additional discovery was necessary to establish that fact and why appellant believed such fact existed. Appellant failed to show that deposing the individual who repaired the fence *after* the alleged incident was likely to produce evidence regarding *how long* the fence was in a downed condition. There was likewise no showing discovery of the "full names" of entities that performed work on the property would establish that respondent had constructive notice of the condition of the fence before the incident.

Appellant's opening brief mentions the "good faith showing by affidavit" required under Code of Civil Procedure section 437c, subdivision (h), but, as respondent points out, the brief does not even address how counsel's declaration satisfied those requirements. In his reply brief, appellant now concedes his counsel's declaration "may not have met" the requirements for a continuance. (Capitalization and boldface omitted.) Appellant merely argues that "bits of information" were "either in the declaration itself, in exhibits attached thereto, or in the body of the Opposition." However, the trial court is not obliged to search for facts that might be "buried in the mound of paperwork filed with the trial court." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116 [addressing facts not mentioned in separate statement].)

Where, as here, the "facts essential to justify opposition" are absent from the declaration, the trial court may properly deny the continuance. "It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show 'facts essential to justify opposition may exist.'" (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548; *California Automobile Ins. Co. v. Hogan* (2003) 112 Cal.App.4th 1292, 1305 [declaration fell far short of the required showing where it "nowhere [set] forth what facts appellants hoped to obtain through further discovery or show[ed] how such facts were essential to opposing [the] motion for summary judgment"].)

The trial court found that appellant failed to set forth facts essential to oppose the summary judgment motion to be obtained by the proposed discovery or any reason why the discovery was not conducted earlier. We agree. The proposed discovery was also not relevant to the issues raised by the summary judgment motion. Information regarding the identities of those who may have worked on the property or fence before or after the incident had no bearing on respondent's knowledge or lack of notice of the alleged hazard on the sidewalk prior to appellant's injury. A continuance is not justified where the party opposing the motion for summary judgment has had more than ample time for discovery and the proposed additional discovery pertains to irrelevant issues. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 75-76.)

Nearly two years had elapsed since the incident. Appellant's action had already been pending a full year, the trial had already been continued once and trial was set to commence within two months. However, appellant offered no justification for any delay in prosecuting his action or in taking discovery. The discovery responses that counsel attached to his declaration were dated October 31, 2003. Appellant did not explain why they had not been received earlier. He provided no evidence of diligence in taking discovery. For example, appellant's counsel did not attach any communications informing respondent that appellant had failed to receive respondent's discovery responses. The declaration attached no "meet and confer" letters to respondent's counsel detailing the respects in which appellant perceived respondent's responses to be inadequate. The record is devoid of any evidence that appellant attempted to obtain timely and adequate responses to his discovery. We further observe that appellant's purported motion to compel is not included in the record, nor is it reflected in the civil case summary.

The trial court did not abuse its discretion in denying appellant a continuance.

2. There Was No Triable Issue of Fact Regarding Constructive Notice

"There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; *County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 637.)

Appellant argues the issue of constructive notice of the downed portion of the fence was a factual issue for the jury. Appellant relies on *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1203 (*Ortega*), in which our Supreme Court set forth the rule, stating: "The cases require that an owner must have actual or constructive notice of the dangerous condition before incurring liability. [Citations.] The plaintiff has the burden to prove the owner had actual or constructive notice of the defect in sufficient time to correct it. [Citation.]" The court acknowledged that "[b]ecause the owner is not the insurer of the visitor's personal safety [citation], the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability." (*Id.* at p. 1206.) Accordingly,

"[m]ost Courts of Appeal hold that a defendant is entitled to judgment as a matter of law if the plaintiff fails to show that the dangerous condition existed for at least a sufficient time to be discovered by ordinary care and inspection." (*Id.* at p. 1207.)

Appellant produced no evidence to show how long the condition existed. For all we know, the fence could have been down only a matter of minutes before appellant tripped over it. According to the undisputed evidence, there was no problem with the fence as late as 4:40 p.m. of the day of the incident. It is as likely as not that some unknown person took a portion of the fence down after the city inspector passed the site and before appellant jogged by the lot. Appellant produced no witnesses who observed the fence downed on the sidewalk for any appreciable time before the incident, nor was it likely that appellant could remedy this lack by further discovery.

The facts are similar to *Perez v. Ow* (1962) 200 Cal.App.2d 559, a case in which plaintiff slipped on some ice cream in a parking lot after leaving defendants' market. The Court of Appeal affirmed a nonsuit where plaintiff presented no evidence on how long the ice cream was present. The court stated, "Plaintiff had the burden of producing evidence of the existence of the condition complained of for at least a sufficient time to support a finding that defendants had constructive notice thereof. This she failed to do." (*Id.* at p. 561.) Thus, "[a]ny inference as to the length of time which the ice cream had been there would be based upon pure speculation and conjecture." (*Ibid.*; see also *Oldenburg v. Sears, Roebuck & Co.* (1957) 152 Cal.App.2d 733, 744-746 [no evidence piece of chalk was on sidewalk for appreciable time before plaintiff's fall]; *Frank v. J. C. Penney Co., Inc.* (1955) 133 Cal.App.2d 123, 126-127 [no evidence of length of time pooled oil was on floor]; *Girvetz v. Boys' Market, Inc.* (1949) 91 Cal.App.2d 827, 828, 831 (*Girvetz*) [presence of banana on floor "'a minute and a half'" before accident too short a period as matter of law].)

"[T]he exact time the condition must exist before it should, in the exercise of reasonable care, have been discovered and remedied, cannot be fixed, but varies according to the circumstances. It may be conceded that ordinary care in the case of a public market involves a more vigilant outlook than in the case of an apartment house lobby." (*Girvetz*, *supra*, 91 Cal.App.2d at p. 831.) As *Girvetz* indicates, we need not and do not set an exact

period of time in which the owner of vacant land might be charged with constructive notice of a dangerous condition with regard to its property.

We hold that, under the circumstances, when respondent inspected its vacant land on a monthly basis and had inspected it only a few days before the alleged incident and found nothing amiss, there was insufficient time for respondent to have constructive notice of a downed fence on its property as a matter of law. "'"[P]roof of negligence in the air, so to speak, will not do."'" (*Ortega*, *supra*, 26 Cal.4th at p. 1206, quoting *Palsgraf v. Long Island R. Co.* (1928) 248 N.Y. 339, 341.)

Appellant contends the evidence of his expert witness indicated the fence in January and February 2002 "appeared flimsy, not sturdy, and easily collapsible." The court properly ordered this evidence to be stricken as conclusory and without foundation. Appellant's self-declared "construction expert" demonstrated no special knowledge, skill, experience, training or education as an expert. The witness's declaration merely asserted that he was "president of Multi-Trade Associates, Inc. which provides expert consultation, services and testimony in the areas of construction, electrical, plumbing, remodeling, repairs, maintenance, renovation and trade installation." However, he attached no resume and offered the court no basis for his claim of expertise, except for the bald statement that "I have been a construction expert since 1992 and consulted for both the Plaintiff and the defense sides."

Appellant's purported expert also demonstrated no personal knowledge. Although he stated he had visited the site, he purportedly based his opinion on viewing unauthenticated photographs which allegedly depicted the lot in January and March 2002. He claimed that the photographs depicted "a lot and a fence that are in the condition of extreme disarray, neglect and dilapidation." He hypothesized that "[t]he surrounding area would lead members of the public to expect a clean, unobstructed walking and running path without tripping hazards . . . ." He asserted that "the debris and garbage on top of and intertwined in the chain link fence mesh was so voluminous so as to support a conclusion of long-standing debris, a fence that had been down, collecting debris for a protracted period of time." These opinions were not based on personal knowledge but constituted inadmissible and irrelevant

speculations and conjecture. (See Evid. Code, §§ 702, 800, 801.) We find no abuse of discretion in the trial court's exclusion of such evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

Appellant further argues that photographs he took of the accident scene "days" after the incident establish there was debris in the downed portion of the fence. Assuming for the sake of argument they depict what appellant claims they depict, the unauthenticated photographs were not properly in evidence. Counsel merely attached the photographs to his declaration and stated without foundation that they depicted the "accident site" and were taken by appellant and his wife "starting on" January 12, 2002. In any case, the question at issue was whether respondent had notice of the condition before the incident in time to remedy it. As the court indicated in denying appellant's motion for reconsideration, even assuming the photographs were taken when they were purportedly taken (sometime after the incident), there is nothing in the photographs to rebut the declarations establishing no one, including appellant, noticed the downed portion of the fence before the incident.

Appellant finally contends there is a factual dispute whether respondent's inspection system was actually carried out. Appellant points to his declaration, offered in support of the motion for reconsideration, stating the fence was down on the day of the incident and argues his declaration was in conflict with the declarations of the city employees, including inspectors and bus drivers, who state they would have seen and reported a downed fence.[2] The fact no one reported the downed fence, however, is entirely consistent with the absence of constructive notice to respondent and fails to raise a triable issue. Appellant further argues debris appearing in photographs taken sometime after the incident "provide demonstrative opposition" to the testimony of respondent's manager that he had inspected the property just a few days before the incident. Even if the photographs were admissible, the presence of debris in or around a chain-link fence is insufficient to support an inference that respondent failed to carry out its inspection system in face of unequivocal testimony

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[2] The court denied reconsideration finding the motion was untimely, was procedurally defective and, "most importantly, [did] not set forth any new facts." Appellant does not purport to appeal from this ruling.

that it did. (*Girvetz, supra*, 91 Cal.App.2d at p. 831.) Speculative inferences do not raise a triable issue of fact. (*Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161 ["When opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork"].)

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

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FLIER, J.

We concur:

COOPER, P.J.

RUBIN, J.